No. 49750-6-II
Consol. with 49706-9-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

CLAY HALTOM,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLALLAM COUNTY

AMENDED BRIEF OF APPELLANT

LILA J. SILVERSTEIN
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711
lila@washapp.org

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

Washington Court of Appeals Decisions

United States Supreme Court Decisions

Constitutional Provisions

Statutes

A. ASSIGNMENTS OF ERROR

1. In violation of the mandatory time limit set forth in RCW 9.94A.753(1), the trial court entered a restitution order more than 180 days after sentencing, without having found good cause for a continuance.

2. Mr. Haltom was deprived of his Sixth Amendment and article I, section 22 right to the effective assistance of counsel when his attorney failed to object to the untimely entry of a restitution order.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. RCW 9.94A.753(1) requires a trial court to enter a restitution order within 180 days of sentencing unless the court finds, prior to the end of the period, that there is good cause for a continuance. Here, the trial court entered a restitution order 204 days after sentencing, without having found good cause for a continuance. Is the restitution order void?

2. The Sixth Amendment and article I, section 22 guarantee criminal defendants the right to effective assistance of counsel, and effective counsel has a duty to research the relevant law. Here, trial counsel failed to object to the late entry of a restitution order, even though this Court has repeatedly held that strict compliance with RCW 9.94A.753(1) is mandatory and that any order entered in violation of that provision is void. Was Mr. Haltom deprived of his constitutional right to the effective assistance of counsel?

C. STATEMENT OF THE CASE

This case is an appeal of a restitution order entered in 2008. This Court granted Mr. Haltom's motion to enlarge the time to file the notice of appeal because Mr. Haltom was not advised of his right to appeal in 2008 and he did not knowingly waive that right.

The State charged Clay Haltom with multiple crimes under three different cause numbers. Ex. 2 at 1-3. He accepted responsibility and pleaded guilty to several crimes in exchange for the dismissal of other charges. *Id.* Under the cause number at issue in this case, he pleaded guilty to the original charge: possession of stolen property in the first degree.[1] CP 31, 43, 52.

In exchange for the State's offer, Mr. Haltom agreed to help law enforcement investigate his codefendants and to testify against them. Ex. 2 at 4. At sentencing, the prosecutor stated, "I have a good deal of personal regard for Mr. Haltom because Mr. Haltom enabled me to settle these cases and Mr. Haltom acted honorably and satisfied all my obligations." RP (6/28/07) 23.[2]

---

[1] He pleaded guilty to three of five counts under another cause number, and the remaining two charges were dismissed. The third case, alleging one count of drug possession, was dismissed. Ex. 2 at 1-3; RP (3/22/07) 4-5.

[2] There were three volumes of transcripts filed in this case. The first, filed under no. 49706-9-II, includes hearing dates 3/22/07, 6/28/07,

At the June 28, 2007 sentencing hearing, the court imposed a 12-month prison-based Special Drug Offender Sentencing Alternative (DOSA), to be run concurrently with a longer sentence in the other remaining case. CP 37; RP (6/28/07) 31. The court scheduled a restitution hearing on both cause numbers for October 5, 2007, to give the State enough time to "review the figures." RP (6/28/07) 31-32.

Mr. Haltom waived his presence at the restitution hearing so as not to disrupt his drug treatment, but his attorney promised to review the State's figures with him. RP (6/28/07) 34-35. The plea offer/agreement that was filed in the trial court (but not signed) included the boilerplate language: "The Defendant agrees to pay … restitution for the charged crimes…." Ex. 2 at 5; *see also* RP (5/17/17) 45. It further stated, under the heading "Restitution for Uncharged Crimes":

> The Defendant agrees to pay restitution to victims of uncharged crimes contained in the discovery or as otherwise stated: **The Defendant agrees to pay restitution in such sums as shall be negotiated between the parties herein. The Prosecution understands, that as a practicable matter, restitution shall be very hard to determine, in any sort of manner which is fair and equitable to numerous victims of crime**.

---

and 11/29/07. The second, also filed under no. 49706-9-II, includes hearing dates 1/18/08, 10/19/16, and 11/15/16. The third, filed under no. 49750-6-II, is the reference hearing of 5/17/17.

Ex. 2 at 5 (bold in original, presumably to highlight specific agreement in this case as opposed to boilerplate).

The court rescheduled the October 5 restitution hearing to October 25 because Mr. Haltom's attorney was unavailable October 5. Ex. 4. The court rescheduled the October 25 hearing to November 15 because the prosecutor was not available on October 25. Ex. 5. The hearing was again rescheduled for November 29 because Mr. Haltom had not been able to review the State's proposed figures before November 15. Ex. 6.

The court held a restitution hearing on November 29, 2007, which was 154 days after sentencing. The court imposed $14,334.66 under the other cause number. RP (11/29/07) 44. But as to the cause number at issue in this appeal, the prosecutor was not ready to request restitution on November 29, 2007. He said:

> I have reviewed some of their applications that the prosecution used in making up the proposed order on restitution, and I'm not going to ask to have that submitted this morning. I'm going to talk to the victims first and review some of the things with them. I think that we need to talk about fair market values and things like that. And so I will withdraw any submittals on the 66-5 case.

RP (11/29/07) 43. At the end of the hearing the prosecutor reiterated:

> The State will reserve on the previous cause that we did not ask for the entry of the order on this morning. I'll go ahead and re-note that after I've had a chance to talk to the victims, and to let them know to give them my view on

> whether or not the Court is ready to look at some of their requests as reasonable or not.

RP (11/29/07) 48.

Despite promising to re-note a restitution hearing, the State did not re-note a restitution hearing within 180 days of sentencing. The prosecutor apparently noted a hearing for January 4, 2008 (190 days after sentencing), but Mr. Haltom's attorney was unavailable. Ex. 9. The hearing was re-noted for January 25, 2008 (211 days after sentencing). Ex. 9. However, that hearing never occurred.

On January 18, 2008, the court held a hearing to address issues regarding credit for time served. RP (1/18/08) 4. But the prosecutor raised the restitution issue at this hearing. Negotiations had been unsuccessful; Mr. Haltom told his attorney that he objected to restitution. RP (1/18/08) 4-5. The court ordered $11,083 in restitution anyway, without holding an evidentiary hearing, without receiving agreement from Mr. Haltom, and without having previously found good cause to continue the restitution hearing beyond 180 days after sentencing. RP (1/18/08) 5; CP 29-30. The discussion was brief:

> [PROSECUTOR]: [T]he State does have a restitution order, has supplied the documentation to [defense counsel] and based upon the conversations that he and the deputy that was handling this, Mr. John Jay, I believe he is prepared to sign the order at this time, although he knows his client will

> object. It's not the documentation that's not supporting it, it's just his client.
>
> [DEFENSE COUNSEL]: That's correct, Your Honor, he has waived his presence. He's serving a DOSA sentence right now. He's objected to the restitution. He doesn't believe he owes any.
>
> THE COURT: Uh hum, well, that's apparently not an appropriate objection, so I will sign the restitution order.

RP (1/18/08) 4-5.

After Mr. Haltom was released from prison, he paid small amounts each month for a while. CP 26. But he eventually stopped submitting payments, and in the fall of 2016 the court held a show cause hearing. CP 23; RP (11/15/16) 14-39.

In response, Mr. Haltom filed a motion to vacate the restitution order. CP 17-19. He argued that the order was invalid because it was entered more than 180 days after sentencing, without a finding of good cause for a continuance. CP 17-19; RP (11/15/16) 16.

The State responded that the motion to vacate was untimely but that Mr. Haltom might be able to file a direct appeal. CP 21. The State noted, "if the defendant was not informed of his right [to] appeal the restitution then he is not limited by the 30[-day] window" for filing a notice of appeal. CP 21; *see also* RP (11/15/16) 19-20 (prosecutor says, "If Mr. Haltom was in fact never informed of his right to an appeal, then that

30-day time window has not yet elapsed and he can still file his appeal with the Court of Appeals.").

The trial court denied the motion to vacate but stated:

> It does not appear from the record that the defendant received notice of his right to appeal the restitution order as it doesn't appear he was present when the order was entered on 1-18-08. This is without prejudice to the State to establish otherwise. Due to the probable lack of appeal rights, the defendant has 30 days from today to file an appeal.

CP 16.

Mr. Haltom then filed a notice of appeal from the restitution order. CP 15. Because more than 30 days had passed since the entry of the order, this Court remanded the case for a reference hearing to determine whether Mr. Haltom was advised of his right to appeal and knowingly waived that right. RP (5/17/17) 1-59.

Following the hearing, the trial court entered findings of fact and conclusions of law. CP 9-11. The court found:

> 19. At no point in the record is there any indication that either the court or counsel advised Haltom of his appeal rights.
>
> 20. At no point in the record is there any indication that Haltom waived his appeal rights.

CP 11. In light of these findings, this Court granted Mr. Haltom's motion to extend the time to file the notice of appeal.

D. ARGUMENT

1. The restitution order should be vacated because the court entered the order after the mandatory 180-day deadline, without having found good cause to extend the deadline.

"A court's authority to order restitution is derived solely from statute." *State v. Gray*, 174 Wn.2d 920, 924, 280 P.3d 1110 (2012). A court may not exceed the authority granted under the relevant statute. *State v. Johnson*, 96 Wn. App. 813, 815, 981 P.2d 25 (1999). If a court enters a restitution order without complying with the statutory requirements, the restitution order is void. *State v. Chipman*, 176 Wn. App. 615, 618, 309 P.3d 669 (2013).

The restitution statute provides, in relevant part:

> (1) When restitution is ordered, the court shall determine the amount of restitution due at the sentencing hearing or within one hundred eighty days except as provided in subsection (7) of this section. The court may continue the hearing beyond the one hundred eighty days for good cause. …

RCW 9.94A.753 (1).

The language of the above statute, particularly use of the word "shall," indicates that strict compliance is mandatory. *State v. Tetreault*, 99 Wn. App. 435, 437, 998 P.2d 330 (2000). The sentencing court must hold a restitution hearing within 180 days of sentencing unless it finds good cause for a continuance *before* the 180-day period has expired. *Chipman*,

176 Wn. App. at 619; *Tetreault*, 99 Wn. App. at 438; *Johnson*, 96 Wn. App. at 816-17.

In several cases, this Court has vacated untimely restitution orders entered in violation of the above mandatory rule. In *Chipman*, the sentencing court entered a timely restitution order as to one victim, but the State sought more time to determine restitution for a second victim. *Chipman*, 176 Wn. App. at 617. The State later moved for an order tolling the 180-day period, but it mistakenly filed the motion after the period had already run. *Id.* At the restitution hearing, which occurred a month after the time had expired, the sentencing court ruled there was good cause to extend the allowable time period. *Id.* at 618. The court also ruled that the imposition of restitution for the second victim was simply a modification or amendment of the timely restitution order for the first victim. *Id.*

This Court reversed. *Id.* at 622. The Court held – and the State conceded – that because the State "filed the motion to toll the time period after the 180-day period expired, the trial court had no authority to extend that period for good cause." *Id.* at 619. The Court further held that although subsection (4) of the restitution statute permits later modification of a timely-entered restitution order, no timely order determining the amount owed to the second victim was ever entered and therefore the

"modification" subsection of the statute did not apply. *Id.* at 621. Thus, the restitution order was void. *Id.* at 618.

This Court reached similar conclusions in *State v. Burns*, 159 Wn. App. 74, 244 P.3d 988 (2011). There, the sentencing court entered a timely restitution order as to some crimes, but the defendant disputed the amount the State proposed for other crimes. *Id.* at 76. The State agreed to schedule a restitution hearing, but failed to do so within 180 days. *Id.* At the late hearing, the court imposed restitution for the other crimes, agreeing with the State that the order was merely a "modification" of the previously entered, timely restitution order. *Id.* at 77.

This Court reversed and remanded for vacation of the second restitution order. *Id.* at 82. The order was entered beyond the 180-day limit, and could not be characterized as a "modification" of the restitution order for the other crimes. Instead, it was the first time that restitution was "determined" for these crimes. The Court observed, "There is no restitution to modify … if it is not 'determined' in the first place under RCW 9.94A.753(1)." *Id.* at 79. Because the trial court "determined" the restitution amount for the crimes at issue after the 180-day period had expired, the order was void. *Id.* at 80.

This Court also reversed in *Tetreault*, 99 Wn. App. at 436. There, the State struck the original restitution hearing and did not reschedule the

hearing until after the 180-day period had expired. The trial court retroactively found good cause to continue because the State had difficulty obtaining documentation to support the restitution request. *Id.* at 436-37. This Court vacated the restitution order because the State had not moved for a good-cause continuance *before* the 180 days had run. *Id.* at 438. *See also Johnson*, 96 Wn. App. at 816-17 (similarly vacating restitution order where trial court found good cause to continue after the time limit had expired).

Here, as in the above cases, the restitution order is void. The trial court entered the restitution order on January 18, 2008, which was 204 days after sentencing. CP 29-42. The State never moved for a good-cause continuance; it withdrew its restitution request on November 29, 2007, and did not reschedule the hearing within the 180-day time limit. RP (11/29/07) 43. The order was not a "modification" of the restitution order entered under the other cause number, but was instead an initial – and untimely – determination of restitution for this cause number. This Court should accordingly reverse and remand for vacation of the restitution order. *Burns*, 159 Wn. App. at 82.

2. Mr. Haltom was deprived of his constitutional right to the effective assistance of counsel when his attorney failed to object to the untimely restitution order.

Criminal defendants have a constitutional right to the effective assistance of counsel. U.S. Const. amend. VI;[3] Const. art. I, § 22;[4] *United States v. Cronic*, 466 U.S. 648, 654, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984); *State v. Hendrickson*, 129 Wn.2d 61, 77, 917 P.2d 563 (1996). On appeal, reversal is required if (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

As to the first inquiry (performance), an attorney renders constitutionally inadequate representation when he or she engages in conduct for which there is no legitimate strategic or tactical basis. *State v. McFarland*, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1998). A decision is not permissibly tactical or strategic if it is not reasonable. *Roe v. Flores-Ortega*, 528 U.S. 470, 481, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000). "Reasonable conduct for an attorney includes carrying out the duty to

[3] The Sixth Amendment provides, in relevant part, "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."

[4] Article I, § 22 of the Washington Constitution provides, in relevant part, "In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel . . . ."

research the relevant law." *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009).

As to the second inquiry (prejudice), if there is a reasonable probability that but for counsel's inadequate performance, the result would have been different, prejudice is established and reversal is required. *Strickland*, 466 U.S. at 694; *Hendrickson*, 129 Wn.2d at 78. A reasonable probability "is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694; *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). It is a lower standard than the "more likely than not" standard. *Thomas*, 109 Wn.2d at 226.

Here, this Court need not reach the ineffective assistance of counsel issue because the trial court entered the restitution order without statutory authority, and this error warrants reversal. It was not Mr. Haltom's fault or defense counsel's fault that this error occurred; the *State* withdrew the restitution request at the November 29 hearing and then failed to re-note the hearing before 180 days had run. RP (11/29/07) 48. However, if this Court determines that trial counsel waived the error by failing to object, it should reverse for ineffective assistance of counsel.

The first prong, deficient performance, is satisfied because it was unreasonable for counsel not to have researched the relevant law. *See Kyllo*, 166 Wn.2d at 862. Had he done so, he would have recognized that

the court lacked authority to enter a restitution order on January 18, 2008. *See* RCW 9.94A.753(1); *Tetreault*, 99 Wn. App. at 436; *Johnson*, 96 Wn. App. at 816-17.

The second prong, prejudice, is also established. Had counsel objected, either the trial court would have refused to enter a late restitution order in light of the above authority, or this Court would have reversed the order on appeal.

In sum, Mr. Haltom was deprived of his constitutional right to the effective assistance of counsel. This error constitutes an independent basis for reversal of the restitution order in this case.

3. Mr. Haltom has a right to appeal the restitution order.

At the reference hearing, the State conceded that the notice of appeal was timely because Mr. Haltom was not notified of the right to appeal and did not knowingly waive it. But it argued that Mr. Haltom does not have a right to appeal the restitution order *at all*. RP (5/17/17) 7. This Court ruled the parties could address the latter issue in the briefing.

Either party in a criminal case may appeal a restitution order. *State v. Kinneman*, 155 Wn. 2d 272, 283-84, 119 P.3d 350 (2005).

Notwithstanding the above rule, the State claims the plea agreement precludes this appeal. RP (5/17/17) 13. The State is wrong. The Statement of Defendant on Plea of Guilty lists only two appellate rights

that Mr. Haltom waived by pleading guilty. First, Mr. Haltom gave up "the right to appeal a finding of guilty after trial." Ex. 1 at 2. Second, Mr. Haltom gave up the right to appeal a "standard range sentence[.]" Ex. 1 at 4. Restitution is not part of a standard range sentence, and is therefore appealable. *Kinneman*, 155 Wn.2d at 283-84.

The "plea offer/agreement" also does not vitiate Mr. Haltom's right to appeal an unlawful restitution order. To begin with, Mr. Haltom did not sign this agreement. Ex. 2 at 6; *see* RP (5/17/17) 45 (court asks, "are those signature blocks for decoration[?]"); Ex. 2 at 5 ("Defendant Understands By Signing This Agreement …"). He did sign the Statement of Defendant on Plea of Guilty, but that document incorporates the plea offer/agreement by reference only as to the prosecutor's recommendation. Ex. 1 at 4. Furthermore, even if one assumes Mr. Haltom impliedly signed the plea offer/agreement, that document does *not* include any agreement to waive the mandatory time requirements of RCW 9.94A.753(1). Ex. 2 at 5.

It is also worth noting that the portion of the plea offer that is specific to this case, rather than serving as mere boilerplate, states that Mr. Haltom "agrees to pay restitution in such sums *as shall be negotiated between the parties* herein." Ex. 2 at 5 (emphasis added). Negotiations broke down and Mr. Haltom objected to restitution. RP (1/18/08) 4-5; RP (5/17/17) 26 ("we weren't able to work it out"). To be sure, the "shall be

negotiated" clause is under the "uncharged crimes" section, but a reasonable reader would view it as applying to all restitution, and any ambiguity must be held against the State. *State v. Bisson*, 156 Wn.2d 507, 517, 521-23, 130 P.3d 820 (2006). In any event, it is clear that Mr. Haltom never agreed to waive the 180-day rule of RCW 9.94A.753(1), and never agreed to waive his right to appeal an order entered in violation of that rule. Exs. 1, 2.

In sum, the sentencing court entered the restitution order outside the 180-day time limit in violation of the mandatory provisions of the restitution statute. This violation renders the restitution order void. In the alternative, Mr. Haltom was deprived of his constitutional right to the effective assistance of counsel when his attorney failed to object to the unlawful order. Finally, Mr. Haltom never agreed to an untimely restitution order and never waived his right to appeal an unlawful restitution order. This Court should accordingly reverse and remand for vacation of the restitution order.

E. CONCLUSION

For the reasons set forth above Mr. Haltom asks this Court to vacate the restitution order.

Respectfully submitted this 11th day of August, 2017.

/s Lila J. Silverstein
Lila J. Silverstein – WSBA 38394
Washington Appellate Project
1511 Third Ave, Suite 701
Seattle, WA 98101
Telephone: (206) 587-2711
E-mail: lila@washapp.org;
wapofficemail@washapp.org

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	NO. 49706-9-II
	)	
CLAY HALTOM,	)	
	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 11TH DAY OF AUGUST, 2017, I CAUSED THE ORIGINAL **AMENDED OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION TWO** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] JESSE ESPINOZA, DPA	( )	U.S. MAIL
[jespinoza@co.clallam.wa.us]	( )	HAND DELIVERY
CLALLAM COUNTY PROSECUTOR'S OFFICE	(X)	E-SERVICE VIA PORTAL
223 E 4TH ST., STE 11		
PORT ANGELES, WA 98362		
[X] CLAY HALTOM	(X)	U.S. MAIL
724 W UNCAS RD	( )	HAND DELIVERY
PORT TOWNSEND, WA 98368	( )	_____

SIGNED IN SEATTLE, WASHINGTON THIS 11TH DAY OF AUGUST, 2017.

X_____

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, Washington 98101
☎(206) 587-2711

WASHINGTON APPELLATE PROJECT

August 11, 2017 - 4:22 PM

Transmittal Information

Filed with Court:	Court of Appeals Division II
Appellate Court Case Number:	49706-9
Appellate Court Case Title:	State of Washington, Respondent v. Clay L. Haltom, Appellant
Superior Court Case Number:	07-1-00066-5

The following documents have been uploaded:

- 7-497069_Briefs_20170811162043D2273930_4080.pdf
  This File Contains:
  Briefs - Appellants - Modifier: Amended
  The Original File Name was washapp.org_20170811_161105.pdf

A copy of the uploaded files will be sent to:

- greg@washapp.org
- jespinoza@co.clallam.wa.us

Comments:

Sender Name: MARIA RILEY - Email: maria@washapp.org
Filing on Behalf of: Lila Jane Silverstein - Email: lila@washapp.org (Alternate Email: wapofficemail@washapp.org)

Address:
1511 3RD AVE STE 701
SEATTLE, WA, 98101
Phone: (206) 587-2711

Note: The Filing Id is 20170811162043D2273930